American Bar Association
www.supremecourtpreview.org

No. 08-598

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,
Petitioner,

v.

MICHAEL BIES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
KIMBERLY A. OLSON
Deputy Solicitors
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REPLY BRIEF OF PETITIONER 1

ARGUMENT 2

A. *Ashe v. Simpson* does not apply to Bies's case 2

1. *Ashe* requires an acquittal, and none occurred here 2

2. *Ashe* does not apply absent re-prosecution or re-punishment 6

B. Even if *Ashe* applies to this case, issue preclusion does not 9

1. *Atkins* effected a substantial change in the law that prevents the application of issue preclusion 9

2. Any mental retardation findings were not "necessary" to the judgments affirming Bies's death sentence 11

3. The State has not had a full and fair opportunity to contest the issue of Bies's mental retardation 13

C. Bies's judicial estoppel argument is both factually and legally incorrect 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page(s)**

Arizona v. Rumsey,
467 U.S. 203 (1984)..... 3

Ashe v. Swenson,
397 U.S. 436 (1970)..... *passim*

Atkins v. Virginia,
536 U.S. 304 (2002)..... *passim*

Balcom v. Lynn Ladder & Scaffolding Co.,
806 F.2d 1122 (1st Cir. 1986) (per curiam)..... 15

Blockburger v. United States,
284 U.S. 299 (1932)..... 7

Brown v. Ohio,
432 U.S. 161 (1977)..... 4

Comm'r of Internal Revenue v. Sunnen,
333 U.S. 591 (1948)..... 10

Dowling v. United States,
493 U.S. 350 (1990)..... 1, 12

Fletcher v. Atex, Inc.,
68 F.3d 1451 (2d Cir. 1995) 12

Frank v. Mangum,
237 U.S. 309 (1915)..... 5

Haring v. Prosise,
462 U.S. 306 (1983)..... 11

Harris v. Washington,
404 U.S. 55 (1971) (per curiam) 4, 12

Hoag v. New Jersey,
356 U.S. 464 (1958)..... 8

Hudson v. United States,
522 U.S. 93 (1997)..... 9

Lockhart v. Fretwell,
506 U.S. 364 (1993)..... 8

Montana v. United States,
440 U.S. 147 (1979)..... 10

Neaderland v. Comm'r of Internal Revenue,
424 F.2d 639 (2d Cir. 1970) 10, 11

New Hampshire v. Maine,
532 U.S. 742 (2001)..... 16, 17, 18

O'Sullivan v. Boerckel,
526 U.S. 838, 845 (1999)..... 16

Payne v. Tennessee,
501 U.S. 808 (1991)..... 14

Penry v. Lynaugh,
492 U.S. 302 (1989)..... 14

Poland v. Arizona,
476 U.S. 147 (1986)..... 2, 3

Sattazahn v. Pennsylvania,
537 U.S. 101 (2003)..... 2, 3

Sealfon v. United States,
332 U.S. 575 (1948)..... 5

State v. Fears,
715 N.E.2d 136 (Ohio 1999) 15

State v. Lott,
779 N.E.2d 1011 (Ohio 2002) (per curiam).... 2, 17

Turner v. Arkansas,
407 U.S. 366 (1972) (per curiam) 4

United States v. Dixon,
509 U.S. 688 (1993)..... 6, 7

United States v. Oppenheimer,
242 U.S. 85 (1916)..... 4, 5

Constitutional Provisions

Ohio Rev. Code § 2929.05(A) (LexisNexis 1996) ... 11

U.S. Const., amend. V 5, 6, 7

Statutes and Rules

28 U.S.C. § 2254(b)(1)(A) 16

28 U.S.C. § 2254(d)..... 6, 9, 16

Ohio Rev. Code § 2929.04(B)(7) 15

Other Authorities

Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807 (1997) 7

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 76 (10th ed. 2002)..... 17

Ruth B. Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 Colum. L. Rev. 256 (1965) 13

18 James Wm. Moore et al., *Moore's Federal Practice* § 132.02 (3d ed. 2008)..... *passim*

Restatement (Second) of Judgments (1982) 10, 11, 13

Wright, Miller & Cooper, *Federal Practice and Procedure* (2d ed. 2002) ..... *passim*

REPLY BRIEF OF PETITIONER

The double-jeopardy rule at issue in this case is straightforward: "In a criminal case, collateral estoppel prohibits the Government from relitigating any ultimate facts resolved in the defendant's favor by [a] prior acquittal." *Dowling v. United States*, 493 U.S. 350, 356 (1990) (Brennan, J., dissenting) (citing *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970)). This rule applies only to subsequent prosecutions of defendants who previously were acquitted.

Respondent Michael Bies stakes his case on a much broader application of *Ashe* than this Court has ever endorsed. Two premises are critical to Bies's analysis: first, that *Ashe* applies even where no acquittal exists, and second, that *Ashe* applies even where the government seeks neither to re-prosecute nor to re-punish the offender. If these premises are correct, then *Ashe* announced a free-floating issue-preclusion doctrine that protects defendants who (1) have never obtained a favorable judgment and (2) face no subsequent "jeopardy." In other words, Bies would completely sever the *Ashe* rule from the text of the Double Jeopardy Clause. But this Court has never taken *Ashe* that far. On the contrary, the "collateral-estoppel component of the Double Jeopardy Clause" is just what its label describes—a *component* of the Double Jeopardy Clause. *Dowling*, 493 U.S. at 348.

Even if Bies's understanding of *Ashe* were correct, his application of issue-preclusion rules is not. Bies acknowledges that *Atkins v. Virginia*, 536 U.S. 304 (2002), dramatically altered the legal landscape, and that concession suffices to establish that the Ohio courts did not "actually decide" the *Atkins* issue when they affirmed his conviction and

death sentence. Moreover, any findings as to Bies's mental retardation were not "necessary" because they made no difference in—and in fact ran contrary to—those judgments. Nor did the State of Ohio have a full and fair opportunity to litigate the issue before "*Atkins* established the new standard for mental retardation." *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002) (per curiam).

ARGUMENT

A. *Ashe v. Swenson* does not apply to Bies's case.

The *Ashe* collateral estoppel rule does not apply to Bies's case for two independent reasons. First, *Ashe* depends on the existence of a prior acquittal, and Bies has never been acquitted of the death penalty. Second, *Ashe*, like all other double-jeopardy principles, protects only defendants who are "twice put in jeopardy," and the civil post-conviction proceeding that Bies initiated in the Ohio courts does not expose him to "jeopardy" of any sort.

1. *Ashe* requires an acquittal, and none occurred here.

"[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal,'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003), and in this case there has not. An "acquittal" occurs if "the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate." *Poland v. Arizona*, 476 U.S. 147, 155 (1986) (emphasis and internal quotation marks omitted). The State of Ohio persuaded not

only Bies's jury but also the reviewing state courts that the death penalty was warranted, beyond a reasonable doubt, because the aggravating circumstances outweighed the mitigating circumstances. Pet. App. 111a (jury); J.A. 106 (Ohio appeals court); Pet. App. 120a-121a (Ohio Supreme Court).

The Sixth Circuit determined, Pet. App. 45a, that Bies was "acquitted" when the Ohio Supreme Court found that his evidence of "mild to borderline mental retardation merit[ed] some weight in mitigation," Pet. App. 120a. The Sixth Circuit reasoned that the Ohio Supreme Court's statement amounted to an "acquittal" under *Sattazahn* because it sufficed to establish Bies's legal entitlement to a life sentence. Pet. App. 45a. As the Warden's opening brief explained (Pet. Br. 14-17), that novel definition of "acquittal" contradicted this Court's decisions in *Sattazahn*, *Poland*, and *Arizona v. Rumsey*, 467 U.S. 203 (1984).

Bies appears to jettison the Sixth Circuit's erroneous reasoning and instead argues (Br. 8, 13) that "nothing in *Ashe* or the substantial body of decisions upon which it relies establishes a formal acquittal as a precondition to the applicability of collateral estoppel." Rather, *Ashe* simply requires "'a valid and final judgment' . . . regardless of whether that judgment takes the precise form of an 'acquittal.'"

The Court indicated several times in *Ashe*, however, that it was crafting a rule that applies only to earlier acquittals. The Court underscored the defendant's "previous judgment of *acquittal*," 397

U.S. at 444 (emphasis added); emphasized that the double-jeopardy bar "surely protects a man who has been *acquitted* from having to 'run the gantlet' a second time," *id.* at 446 (emphasis added and citation omitted); and explained how to apply its rule in cases "where the first judgment was based upon a general verdict of *acquittal*," *id.* at 444 (emphasis added).

Later decisions by both this Court and lower courts confirm that *Ashe* depends on an earlier acquittal. This Court consistently has described the issue-preclusion rule in *Ashe* as relevant only where "a prior acquittal" exists, *Brown v. Ohio*, 432 U.S. 161, 165 (1977), and has applied *Ashe* to bar subsequent prosecutions only following earlier acquittals, see, e.g., *Turner v. Arkansas*, 407 U.S. 366, 369-70 (1972) (per curiam); *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam). The federal courts of appeals are in accord. See Pet. Br. 21-22 (citing cases). Bies makes no effort to distinguish or rebut this long line of cases, nor does he cite any cases applying *Ashe* without a prior acquittal.

Instead, Bies relies on two cases that preceded *Ashe* (Br. 14-15) for the proposition that, at least in theory, *Ashe* does not require an earlier acquittal. Neither case, however, supports Bies's position. The first case—*United States v. Oppenheimer*, 242 U.S. 85 (1916)—afforded double-jeopardy protection to a prior acquittal. After the defendant obtained "a judgment of acquittal on the ground of the statute of limitations," the government tried to prosecute him again on "the same offence." *Id.* at 86-87. This Court barred the retrial. *Id.* at 88. The Court

explained that, "when a man once has been acquitted on the merits," the Fifth Amendment—following "what in the civil law is a fundamental principle of justice"—does not permit "the Government to prosecute him a second time." *Id.* at 88. *Oppenheimer* accordingly confirms that the criminal collateral estoppel rule depends on a first acquittal. See also *Sealfon v. United States*, 332 U.S. 575, 578 (1948) (citing *Oppenheimer* in holding that res judicata barred the government from prosecuting a defendant for fraud after he was acquitted of conspiracy to commit the same fraud).

The second case that Bies cites is beside the point because it is not a double-jeopardy case. The petitioner in *Frank v. Mangum*, 237 U.S. 309, 324-25 (1915), claimed that disorder and hostile community sentiment, among other things, deprived him of due process during his capital murder trial. The question before this Court was the weight that federal courts sitting in habeas should give to the Georgia Supreme Court's earlier findings on that due process claim. *Id.* at 333-34. The Court cited what is now recognized as the issue-preclusion rule, *id.* at 334, and decided to credit the state-court findings, *id.* at 336. At no point, however, did the Court address whether the jury's guilty verdict carried any preclusive effect, because that question was not presented.

Given the complete dearth of authority for Bies's position, one of two things must be true: either (1) Bies's reading of *Ashe* is incorrect, and the collateral estoppel component of the Double Jeopardy Clause protects only those defendants who have in

hand an earlier acquittal; or (2) Bies's reading of *Ashe*, while plausible, is not clearly established by this Court's decisions. If the former is true—and the Warden maintains that it is—then Bies cannot claim double-jeopardy injury. But even if the latter is true, then the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") bars federal habeas relief. 28 U.S.C. § 2254(d)(1).

2. *Ashe* does not apply absent re-prosecution or re-punishment.

The Double Jeopardy Clause protects only those defendants who are "twice put in jeopardy." U.S. Const., amend. V. "Jeopardy" means either a "successive punishment" or a "successive prosecution." *United States v. Dixon*, 509 U.S. 688, 704 (1993). A civil *Atkins* hearing on state post-conviction review is neither a second punishment (because the original punishment, not a new one, is at issue) nor a second prosecution (because the State did not initiate the action). See Pet. Br. 25-27.

Bies's chief argument in response is that *Ashe* applies even without the presence of a second jeopardy. He frames *Ashe*'s rule this way: "'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties *in any future lawsuit*." Br. 16 (quoting *Ashe*, 397 U.S. at 443 (emphasis added by Bies)). Thus, Bies submits (Br. 16-17), *Ashe*'s estoppel rule can arise in "rare cases" that do not "take the form of a successive prosecution."

Bies's argument loses sight of the fact that this case arises under the Double *Jeopardy* Clause. The Clause contains two parts: "nor shall any person be subject [1] for the same offence [2] to be twice put in jeopardy of life or limb." U.S. Const., amend. V. *Ashe* is in tension with the first part—the "same offence" language—because it bars subsequent prosecutions of offenses that, strictly speaking, are different. See *Dixon*, 509 U.S. at 704-05 (observing that *Ashe* can apply to cases that are not the same offense under *Blockburger v. United States*, 284 U.S. 299, 304) (1932)); see also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1828 (1997) (same). In *Ashe* itself, for instance, the defendant was acquitted of robbing one of six victims at a poker game. The Court held that the acquittal prevented the government from prosecuting the defendant for robbing any of the remaining five victims, even though the robberies of those other victims constituted different crimes under the same-elements test. 397 U.S. at 446.

Bies would have the Court turn this partial infidelity to the Double Jeopardy Clause's text into a full divorce by abandoning the "put in jeopardy" requirement as well. But if *Ashe* requires neither the "same offence" nor a second "jeopardy," then nothing binds the collateral estoppel component to the Clause from which it derives. What remains instead is a free-floating constitutional rule of issue preclusion for defendants who once were criminally prosecuted.

Such a standalone doctrine of criminal collateral estoppel finds no basis in the

Constitution's text or this Court's case law, including *Ashe*. This Court long ago rejected the invitation to create such a rule under the Due Process Clause. See *Hoag v. New Jersey*, 356 U.S. 464, 471-72 (1958). And *Ashe* emphasized that it was drawing a constitutional line that prevented the State from attempting to "hale [a defendant] before a new jury" to relitigate a settled issue. 397 U.S. at 446. Bies does not cite a single case holding that *Ashe* applies where no second jeopardy exists. Nor does he attempt to distinguish the litany of cases cited in the Warden's brief (Pet. Br. 28-29) holding that *Ashe* requires a subsequent prosecution. Bies likewise leaves unanswered the Warden's argument (Pet. Br. 30-32) that requiring Bies to carry the burden on his *Atkins* claim does not offend the finality, repose, and anti-harassment interests of the Double Jeopardy Clause.

Bies suggests a different theory in a footnote (Br. 18 n.8): that "the State created the threat of further jeopardy by . . . insisting that the question of Bies' mental retardation—and consequently his eligibility for a death sentence—be reopened." Although not perfectly clear, this argument appears to be that the State placed Bies under "the threat of further jeopardy" when it opposed his motion to vacate his death sentence. But in the civil post-conviction proceeding at issue, the State is simply defending against collateral attack its legitimate and "strong interest in the finality of criminal convictions." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). It is not exposing Bies to any "jeopardy," and certainly not to the sort of additional "*criminal* punishment" against which the Double Jeopardy

Clause protects. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

At the very least, this Court's case law does not clearly establish that *Ashe* applies in civil cases where no re-prosecution or re-punishment is at issue. 28 U.S.C. § 2254(d)(1). Bies is therefore not entitled to the habeas writ.

B. Even if *Ashe* applies to this case, issue preclusion does not.

Even assuming that the collateral estoppel component of the Double Jeopardy Clause applies absent both an acquittal and a second jeopardy, Bies is entitled to no relief for an additional reason: He has not satisfied the requirements for issue preclusion. The state post-conviction court concluded as much, see Pet. App. 102a-104a, and that reasonable conclusion must stand under AEDPA, 28 U.S.C. § 2254(d)(1)-(2).

1. *Atkins* effected a substantial change in the law that prevents the application of issue preclusion.

Bies agrees (Br. 9) with the Warden on at least one significant point: that "the legal consequences which attach to the factual determinations that Bies is mentally retarded certainly changed with *Atkins*." The parties disagree, however, on whether that significant change prevents the application of issue preclusion in Bies's favor. Bies argues (Br. 26-27) that it does not because the underlying factual question—whether Bies is mentally retarded—remains the same. Assuming that Bies is correct that a mental-retardation determination is a factual

inquiry and that the root facts have not changed, he is wrong about the law of issue preclusion. Significant legal changes preclude the operation of collateral estoppel even where the underlying historical facts remain the same.

Issue preclusion does not apply—because the issue is not "actually decided"—when "controlling . . . legal principles have changed significantly since the [earlier] judgment." *Montana v. United States*, 440 U.S. 147, 155 (1979). "Even if the issue is identical and the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially 'the same bundle of legal principles that contributed to the rendering of the first judgment.'" *Neaderland v. Comm'r of Internal Revenue*, 424 F.2d 639, 642 (2d Cir. 1970) (quoting *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 602 (1948)). Hornbook statements of issue-preclusion rules are to the same effect. See 18 James Wm. Moore et al., *Moore's Federal Practice* § 132.02[2][f] (3d ed. 2008); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4425, p. 674 (2d ed. 2002); Restatement (Second) of Judgments § 28 cmt. c (1982).

The only question, then, is whether the applicable "legal principles have changed *significantly*"—or, put differently, whether a "major doctrinal shift[]" has occurred—since the initial judgment. *Montana*, 440 U.S. at 155, 162 (emphasis added). Bies acknowledges (Br. 17, 26) that this Court "undeniably changed the law" in *Atkins*. That point of agreement resolves the matter. "[T]he

application of collateral estoppel against the [State] in this case would exemplify blind reliance upon doctrine in the face of obviously substantial dissimilarities between the legal principles governing the civil suit and those which were applicable in the criminal prosecution which preceded it." *Neaderland*, 424 F.2d at 643.

2. Any mental retardation findings were not "necessary" to the judgments affirming Bies's death sentence.

"[C]ollateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action." *Haring v. Prosise*, 462 U.S. 306, 315 (1983). An issue is "necessary" or "essential" when the judgment was "dependent on the determination made of the issue in question." *Moore's Federal Practice* § 132.03[4][a]. As Bies himself seems to acknowledge (Br. 29), the state courts could have come out either way on the question of Bies's mental retardation and still affirmed his death sentence. Because the issue made no difference to the judgments, it carries no preclusive effect. See Restatement at § 27 cmt. h.

Bies argues that the mental-retardation issue was necessary in a different sense. Ohio law required the Ohio Supreme Court (and the intermediate appellate court) on direct appeal to reweigh the aggravating and mitigating circumstances and independently assess the appropriateness of the death penalty. See Ohio Rev. Code § 2929.05(A) (LexisNexis 1996). The parties agree that the Ohio courts undertook that review in

this case. See J.A. 106; Pet. App. 118a-121a. But the fact that an independent evidentiary weighing was required does not mean that any particular mitigation finding was "necessary to the judgment" for issue-preclusion purposes.

"[F]indings contrary to the judgment are not necessary and do not support issue preclusion." *Federal Practice and Procedure* § 4421, p. 552. "This is especially true when the issue in the prior case was decided adversely to the party that prevailed in the ultimate judgment." *Moore's Federal Practice* § 132.03[4][k][ii]; see, e.g., *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1457 (2d Cir. 1995). Assuming the state courts' statements on direct review concerning Bies's mental-retardation evidence amounted to factual findings (see Pet. Br. 33), they fall squarely within the category of findings "considered unnecessary for purposes of issue preclusion," because, far from supporting the judgments affirming Bies's death sentence, they "would support an opposite judgment." *Moore's Federal Practice* § 132.03[4][k][ii].

The *Ashe* line of cases provides another way to reach the same conclusion. *Ashe* applies "when an issue of ultimate fact has once been determined by a valid and final judgment," *Ashe*, 397 U.S. at 443, or when the first adjudication resolves "an ultimate issue" in the second case, *Dowling*, 493 U.S. at 348; see also *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam) (applying *Ashe* after "[t]he State concede[d] that the ultimate issue of identity was decided by the jury in the first trial"). Because the boundary between "ultimate facts" and "evidentiary"

or "mediate facts" is "notoriously obscure," Ruth B. Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 Colum. L. Rev. 256, 259 (1965), most courts and commentators have abandoned the distinction to focus instead on "whether the issue was actually recognized by the parties as important and by the trier of fact as necessary to the first judgment." Restatement at § 27 cmt. j; see also *Moore's Federal Practice* § 132.03[4][j][ii] (citing cases for the proposition that "most courts now reject the distinction"). Still, "the very conclusion that a particular determination did not involve any ultimate issue may be taken to show that it was not necessary to the result." *Federal Practice and Procedure* § 4421, p. 545. That is true here. The "ultimate issue" at Bies's penalty phase was not whether he was mentally retarded; it was whether the death penalty was appropriate because the aggravating circumstances in the case outweighed his mitigating evidence. Any findings concerning Bies's mental retardation therefore were not necessary to the judgments for the State.

3. The State has not had a full and fair opportunity to contest the issue of Bies's mental retardation.

"[I]ssue preclusion can only be applied against parties who have had a prior 'full and fair' opportunity to litigate their claims." *Moore's Federal Practice* § 132.04[1][a][ii]. In this case, the State lacked such a full and fair opportunity in two respects: (1) The State could not have foreseen that *Atkins* would substantially change the legal relevance of mental-retardation evidence in capital

trials; and (2) the State had no chance to appeal the findings as to Bies's mental retardation. See Pet. Br. 44-46.

Bies first responds (Br. 9, 29-30) that the Warden's argument is "legally irrelevant" because the State's desire to produce more or different evidence on relitigation does not change the fact that the issue has been decided. But the Warden is not asking for a second bite at the apple; the point is that the Warden never had a first bite at *this apple*. "Substantial changes in the legal context [and] the consequences of the issue . . . support the conclusion that the initial opportunity was not sufficient to support preclusion." *Federal Practice and Procedure* § 4424, p. 641.

To this argument Bies answers (Br. 31-34) that *Atkins* was "hardly unforeseeable." He explains that *Penry v. Lynaugh*, 492 U.S. 302 (1989), "put states on clear notice that a categorical exemption from the death penalty for mentally retarded offenders could come to pass." After *Penry*, "things began to change rapidly," and by "the time of Bies' direct appeal in 1996 . . . the trend was unmistakable." The State of Ohio therefore had ample "incentives to contest the fact of Bies' mental retardation."

Bies's argument disregards the rule of *stare decisis* and would impose an impossible burden on the States. The State of Ohio was not just entitled to rely on *Penry* as controlling precedent before *Atkins*; it was required to do so. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that *stare decisis* "fosters reliance on judicial decisions"). Moreover,

the rules of issue preclusion did not require prosecutors in Ohio to follow legislative developments in other States in order to know how vigorously to contest Bies's mitigation evidence. Instead, the State reasonably relied on settled law and treated Bies's mental-retardation evidence the way the Ohio Supreme Court treated such evidence—as meriting "some weight" under the State's catch-all mitigation factor. *State v. Fears*, 715 N.E.2d 136, 155 (Ohio 1999) (citing Ohio Rev. Code § 2929.04(B)(7)).

The State had no full and fair opportunity to contest Bies's mental-retardation claim for a second reason: It could not appeal the state courts' findings on direct appeal after those courts ruled in the State's favor. "[C]ollateral estoppel does not apply to an unappealable determination." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998).[1] The State of Ohio prevailed in Bies's direct appeal when both the intermediate appellate court and the Ohio Supreme Court affirmed his conviction and sentence. J.A. 106-07; Pet. App. 121a. Bies does not dispute that the State could not have appealed the statement that "Bies's personality disorder and mild to borderline mental retardation merit some

[1] In this respect, the "full and fair opportunity" element of issue-preclusion analysis dovetails with the "necessary to the judgment" prong. A party who loses on an ancillary issue but wins a favorable judgment cannot appeal on the ancillary issue. But the prevailing party is not later estopped on that issue because it ran contrary to, and thus was unnecessary to, the judgment. *Balcom v. Lynn Ladder & Scaffolding Co.*, 806 F.2d 1122, 1127 (1st Cir. 1986) (per curiam); see also *Moore's Federal Practice*, § 132.03[4][k][ii].

weight in mitigation." Pet. App. 120a. And even if the State could have appealed, it had no reason to do so. Issue preclusion therefore does not apply.

C. Bies's judicial estoppel argument is both factually and legally incorrect.

Bies argues (Br. 33 n.13) that earlier statements by the State contradict the Warden's position in this case and warrant the application of judicial estoppel. That argument is misplaced.

As an initial matter, legal obstacles prevent the Court from reaching Bies's judicial estoppel argument. First, the claim is unexhausted, see *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), and federal habeas relief cannot be granted on unexhausted claims. 28 U.S.C. § 2254(b)(1)(A). Second, Bies waived his judicial-estoppel claim by not including it in his Third Amended Habeas Petition. See 6th Cir. J.A. 421-26. Third, because judicial estoppel is an equitable doctrine, not a command of the Constitution or federal law, see *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001), it affords no basis for federal habeas relief. See 28 U.S.C. § 2254(d)(1) (allowing federal habeas relief only if the state court's decision was "contrary to" or "an unreasonable application of" "clearly established Federal law").

Even if the Court were to reach the merits of Bies's judicial-estoppel claim, the elements of the doctrine favor the State, not Bies. See generally 18B Wright, Miller & Cooper, *Federal Practice & Procedure* § 4477 (2d ed. 2002). To begin with, the State did not take "'clearly inconsistent'" or

misleading positions. *New Hampshire*, 532 U.S. at 750 (citation omitted). Viewed in context, the statements that Bies identifies (Br. 1, 3, 17, 22, 27 n.11, 33 n.13) as the State's concessions that he is mentally retarded were merely instances in which the State summarized Bies's mitigation arguments. See J.A. 66, 143. Even assuming the statements were concessions of a sort, at most the State admitted that Bies's IQ falls in the range of mental retardation. But after *Atkins*—under what the Ohio Supreme Court called "the new standard for mental retardation," *Lott*, 779 N.E.2d at 1015—"IQ tests . . . alone are not sufficient to make a final determination on this issue." *Id*. at 1014. Instead, a full concession as to mental retardation also should have addressed the remaining elements of the post-*Atkins* standard—deficiencies in adaptive skills and onset before the age of eighteen. *Id.*; see, e.g., American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 76 (10th ed. 2002) (explaining that adaptive skills should be tested by "standardized measures"). The State's earlier statements did not address those other required factors because no record evidence existed on those factors. The statements therefore are consistent with the State's later, post-*Atkins* position regarding the question of Bies's mental retardation.[2]

---

[2] Bies separately suggests (Br. 2 n.2, 24) that the Warden's Petition for Writ of Certiorari conceded the accuracy and completeness of Dr. Winter's testing methods, but again Bies takes the Warden's words out of context. As already explained (Reply in Supp. of Pet. for Cert. 8-9), the Warden in the passage at issue simply was summarizing the Sixth Circuit's findings

Furthermore, the State did not induce the state courts' reliance. See *New Hampshire*, 532 U.S. at 750-51. The State's briefs on direct appeal accurately stated that Bies "was *supposedly* retarded and/or low intelligence," without inviting a holding on the matter in Bies's favor. J.A. 78 (emphasis added); see also J.A. 120 (same). Meanwhile, the state appellate court on Bies's first round of post-conviction review invoked a procedural bar when it rejected Bies's mental-retardation claim. J.A. 176. Nothing the State might have said on the substance of Bies's mental-retardation claim in those proceedings could have affected that procedural ruling.

---

and reasoning. Far from conceding that Dr. Winter used the required analysis, the Warden has catalogued the deficiencies in her testing methods (Pet. Br. 39-40).

CONCLUSION

The Court should reverse the Sixth Circuit's grant of the habeas writ.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
KIMBERLY A. OLSON
Deputy Solicitors
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

April 8, 2009